IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE STANDARD ACCIDENT INSURANCE COMPANY, a corporation, *Appellant,* vs. EDNA L. HEATFIELD, *Appellee.*	No. 10517

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

HONORABLE L. B. SCHWELLENBACH,
United States District Judge

APPELLEE'S BRIEF

HARRY M. MOREY,
Spokane, Washington,
Attorney for Appellee.

EMPIRE PRINTING CO., SPOKANE

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TEXT

JURISDICTION

We believe the District Court had jurisdiction as appears from the Petition for Removal from the State to the Federal Court (Tr. p. 19-20) and the Order of Removal (Tr. p. 22-23) all of which, together with the law applicable appears on page 1 of appellant's brief.

We believe this Court has jurisdiction as appears on page 1 of appellant's brief.

STATEMENT OF THE CASE

Appellant's brief substantially sets forth the material elements of the pleadings and the action of the trial court with reference thereto.

The appellee desires to supplement the statement of the case and will try to set forth the material portions of the testimony that were admitted without objection and of the testimony admitted over objection.

EVIDENCE ADMITTED WITHOUT OBJECTION:

Assured was 65 years of age. He was a Special Agent for an insurance company (Tr. p. 151). He was not accustomed to doing hard, manual work (Tr. p. 152). He had never been bothered with heart trouble (Tr. p. 152). His health had always been good (Tr. p. 153). He was of an excitable, nervous disposition (Tr. p. 153).

He left his home in Spokane, Washington, on the morning of June 30, 1942, by automobile for Republic and Colville and when he left he was in his customary

good health (Tr. p. 153). An old friend talked with him at Republic, Washington, about two o'clock in the afternoon of that day and he was "the same old Gus" and no evidence of physical ailment (Tr. p. 47). The friend directed him to go to Curlew, a distance of 21 miles from Republic (Tr. p. 48) and then over the Curlew-Orient Road.

The Curlew-Orient Road is an unfrequented highway with few farms or ranches along its course. The nearest farm to the scene of the events hereinafter recited was the home of Ralph Harrington, three miles toward Curlew (Tr. p. 50).

About six p.m. on June 30, Ralph Harrington and his wife, Floy, were driving from Orient to their home, and saw assured alone, signaling for help. Assured's car was definitely off the road to such an extent that Harrington had to tow it back (Tr. p. 51-52). Harrington testified: "Well he seemed pretty tired and fagged out, and seemed worried. * * * The car was there to stay without help. * * * There was a rock under the running board in front of the rear wheel and that dirt was soft on that side and it just kept burying down. He had evidently tried to build it up and get it back on this boulder to get back on the road, but it was so soft all his efforts was lost whenever he tried it" (Tr. p. 52).

Harrington said assured had a shovel and testified: "You could see where he had shoveled dirt all right" (Tr. p. 52).

It had taken Harrington one and a half hours to drive from Colville to that scene (Tr. p. 53).

Plaintiff's exhibit "A" (a photograph) was shown witness Harrington and he said the picture looked like the place, and the photograph was admitted in evidence without objection (Tr. p. 53).

The Forest Ranger's Camp was two miles east of the scene (Tr. p. 61).

Witness Harrington further testified that two or three days after that event he talked with a young man named Heatfield at the Harrington place and he told this young man "as near as I could" where the car had been off the road (Tr. p. 63-64).

Portions of the deposition of Thomas A. Heatfield, son of assured, were read into the record. The following testimony was offered by appellant's counsel on his own cross-examination and no objection was made by the appellee.

> "Q. You testified, Mr. Heatfield, if I understand you correctly, that there was considerable——that there was about 500 or 600 pounds of earth removed?
>
> "A. Yes.
>
> "Q. And that was moved from the shoulder of the road?
>
> "A. Yes." (Tr. p. 173)

Thomas A. Callan testified without objection that he was staying at a Forest Ranger's Camp at the summit of the road and that about 6:30 p.m. on that date, assured called at the camp, and that he was sick; that he was trying to vomit; and that at one time he was lying

down by his car; and that part of the time he was stooped over "like he was sick"; and that he said that he did not need any help. Callan said he put the assured to bed and the next morning the men in the camp found he had died during the night (Tr. pp. 97-109).

Plaintiff in the case testified without objection that when she saw assured's top shirt "it was stained and yellow clear to the shoulders, the collar was wilted and stained clear through with what I took to be perspiration" (Tr. p. 153).

Floy Harrington testified that she was the wife of witness, Ralph Harrington, and that she was with Harrington when assured was found by the road. Without objection she testified that "he seemed quite hot and tired, really exhausted, would be my word—— looked like he was all in" (Tr. p. 66).

TESTIMONY ADMITTED OVER OBJECTION:

Over objection Floy Harrington testified: "Well, as I said, he was holding his hands sort of like that and he said: 'I have an awful pain. I have a pain in my heart, the first time in my life I ever had trouble with my heart.' He said it was so hot and he got so tired and exhausted he had to *like* down. He said he had been there an hour and I asked him if he tried to get his car out—and he said yes, he had tried to back up and tried to go forward, but he could not go either way. He said his car was stuck there and he tried to get it out and he could not by himself" (Tr. pp. 70-71).

On cross-examination by appellant's counsel, she

testified: "He said he had been there for two hours. He said he laid down an hour (Tr. p. 72). He was standing kind of dejected like, like you would if you had been working hard and were over tired or overworked or dog tired—overheated" (Tr. p. 75).

Witness Thomas Callan testified over objection as follows:

> "Q. Did this man say anything to you about any work he had done down the road?
> "A. Yes, he said he had over exerted himself." (Tr. p. 109)

Dr. W. N. Myhre testified that in his opinion Mr. Heatfield died of miocardial insufficiency caused by over-exertion (Tr. pp. 122, 125, 128). Dr. George A. C. Snyder testified that assured died of coronary insufficiency caused by over-exertion (Tr. pp. 143-144).

SUMMARY OF ARGUMENT

I. The complaint stated a cause of action.

Horsfall v. Pacific Mutual Life Ins. Co., 132 Wash. 32; 72 Pac. 1028;
Hodges v. Mutual Benefit H. & A. Assn., 15 Wash. (2) 699; 131 Pac. (2) 937;
Maryland Casualty Co. v. Pioneer Sea Foods Co., 116 F. (2) 38;
Zinn v. Equitable Life Ins. Co., 6 Wash. (2) 379; 107 Pac. (2) 921;
Carpenter v. Pacific Mutual Life Ins. Co., 145 Wash. 679; 261 Pac. 792;
U. S. Mut. Acc. Assn. v. Barry, 33 L. Ed. 60; 131 U. S. 100;
Pierce v. Pacific Mutual Life Ins. Co., 7 Wash. (2) 151; 109 Pac. (2) 322;
Kearney v. Washington National Ins. Co., 184 Wash. 579; 52 Pac. (2) 903.

II. There was ample testimony introduced in evidence without objection to take the case to the jury.

III. The trial court committed no error in admitting certain portions of Thomas A. Heatfield's deposition.

IV. The trial court committed no error in admitting in evidence the testimony of Floy Harrington and Thomas Callan, same having been admitted under the doctrine of *res gestate.*

Bothell v. The City of Seattle, 17 Wash. 263; 49 Pac. 491;

Shearer v. Town of Buckley, 31 Wash. 370; 72 Pac. 76;

Buell v. Park Auto Trans. Co., 132 Wash. 92; 231 Pac. 161;

Starr v. Aetna Life Ins. Co., 41 Wash. 199; 83 Pac. 113;

Hines v. Foster, 166 Wash. 165; 6 Pac. (2) 597;

Preferred Acc. Ins. Co. of N. Y. v. Combs, 76 Fed. (2) 775;

Collins v. Equitable Life Ins. Co., 130 A. L. R. 287; 8 S. E. (2) 825;

Chesapeake & Ohio Ry. Co. v. Mears, 64 Fed. (2) 291.

V. The tendency of the courts is to extend rather than restrict the introduction of evidence under the doctrine of *res gestae:* and in any event, whether evidence is properly admitted is left to the sound discretion of the trial court and error will not be declared

unless there has been a manifest abuse of discretion.

Chesapeake & Ohio Ry. Co. v. Mears, 64 Fed. (2) 291;

Fort St. Union Depot Co. v. Hillen, 119 Fed. (2) 307;

Rast v. Mutual Life Ins. Co. of N. Y., 112 Fed. (2) 769;

William C. Barry, Inc., v. Baker, 82 Fed. (2) 79;

Wilkins v. Knox, 142 Wash. 571; 253 Pac. 797.

VI. The trial court committed no error in ruling that Exhibit "C" hereinafter called the "letter of July 8" was notice to the appellant as required by the policy.

33 C. J. (Ins.) page 16;

McKillips v. Ry. Mail Assn., 10 Wash. (2) 122; 116 Pac. (2) 330.

VII. There having been no proper exception taken to the court's instructions, the instructions became the law of the case.

Rules of Civil Procedure, Rule 51, 28 U. S. C. A.;

Krug v. Mutual Benefit Health & Acc. Assn., 120 Fed. (2) 296.

ARGUMENT

The Supreme Court of the State of Washington in the case of *Horsfall v. Pacific Mut. Life Ins. Co.,* 32 Wash. 132; 72 Pac. 1028, held that death by unusual exertion or by exertion under unusual circumstances was death by "accidental means" under a policy that had more restrictions in favor of the insurer than the Heatfield policy has.

We quote from the opinion: "death by accident is defined to be 'death from any unexpected event, which happens as by chance, or which does not take place according to the usual course of things' so a sprain of the muscles of the back, caused by lifting heavy weights in the course of business, is injury by accident or violence occasioned by external or material causes operating on the person of the assured."

Until reversed that decision became the law of the State of Washington and became binding on the Federal Courts functioning as such within the State of Washington.

> *Erie Ry. Co. v. Tompkins,* 82 L. Ed. 1188; 114 A. L. R. 1487; 304 U. S. 64;
> *Maryland Casualty Co. v. Pioneer Seafoods Co.,* 116 Fed. (2) 38.

In the case last cited, this Court had occasion to pass on what constituted an "accident" and said:

> "The problem here is one of interpretation of the contract, a question, the decision of which is controlled by the State Law * * * Erie Ry. Co. v. Tompkins, 304 U. S. 64, * * *. In United States Mutual Acc. Assn. v. Barry, 131 U. S. 100; 33 L.

> Ed. 60, it is said that 'if in the act which precedes the injury something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means.' That rule has been approved in McNally v. Maryland Cas. Co., 162 Wash. 321, 325; 298 Pac. 721. A similar statement may be found in Horsfall v. Pacific Mutual Life Ins. Co."

In the case of *Zinn v. Equitable Life Insurance Company*, 6 Wash. (2) 379; 107 Pac. (2) 921, the Supreme Court of the State of Washington very definitely held that death may be by accidental means even though the insured intended to do the thing which he did. The opinion points out that Washington differs from many other jurisdictions in that respect, but definitely announces the rule as above set forth.

We quote from the opinion:

> "The authorities reflect two clearly defined lines of thought on this question. One line * * * holds that death is not accidental in cases in which an unusual or unexpected result occurs by reason of the doing of an intentional act on the part of the insured; that it must appear that the means used was accidental, and that it is not sufficient to show that the final result was unusual, unexpected or unforeseen. The other line of cases holds that, where injury or death is the unusual, unexpected or unforeseen result of an intentional act, such injury or death is by accidental means even though there is no proof of mishap, mischance, slip, or anything out of the ordinary in the act or event which causes the injury or death. * * * Other cases * * * uphold the idea that death is accidental even though the means are intentional when the results are unusual, unexpected or unforeseen. We feel that the principle of law an-

nounced in the cases last cited reflects the great weight of authority and rests upon sound legal principles."

The Supreme Court of the State of Washington held in the cases of *Kearney v. Wash. Nat. Ins. Co.*, 184 Wash. 579, 52 Pac. (2) 903, and *Pierce v. Pac. Mut. Life Ins. Co.*, 7 Wash. (2) 151, 109 Pac. (2) 322, that even though an assured may have a physical ailment which may contribute to his death or disability, nevertheless his death or disability is caused by "accidental means" if the "accidental means" has been the predominant cause of his death or disability.

After the Heatfield case was started the opinion of the Supreme Court of the State of Washington came down in the case of *Hodges v. Mut. Ben. H. & A. Assn.*, 15 Wash. (2) 699, 131 Pac. (2) 937, in which that court said that Hodges' death was not by "accidental means," but instead of upsetting the *Horsfall* decision the opinion reaffirms the law as announced in the *Horsfall* case. The Court disallowed recovery for the plaintiff in the *Hodges* case because the undisputed testimony showed that Hodges was doing something he was in the habit of doing. According to the undisputed testimony in that case there was nothing unusual or out of the ordinary in Hodges' dancing. It was something he did regularly every two weeks.

There were no exceptions taken to the instructions of the Court in the Heatfield case on this question. The instructions followed the law as announced in the cases next above set forth and other cases of a similar nature.

and the instructions became the law of the Heatfield case.

Furthermore the appellant has not argued this question in its brief and has cited no authorities other than that the complaint did not state a cause of action because, as it claims, the letter of July 8 was not notice of claim. We maintain that the complaint stated a good cause of action as far as "accidental means" is concerned.

The next question is whether the plaintiff introduced sufficient evidence to take the case to the jury.

Some cases must and should go to the jury on circumstantial evidence. A good example of that is the decision of this Court in the case of *Occidental Life Insurance Company v. Thomas,* 107 Fed. (2) 876, in which this Court approved the entry of judgment for the plaintiff in a drowning case where there was no direct evidence that Mr. Thomas had fallen in the lake and drowned. The judgment was based on circumstantial evidence only.

In the Heatfield case no one saw Mr. Heatfield doing any hard, manual labor on his car. But the following facts stand out definitely and positively even without the objected testimony of Mrs. Harrington, Mr. Callan and young Mr. Heatfield.

Mr. Heatfield was in good health when he left his home on the morning of June 30. He had never noticed any heart trouble. He was in his customary good health at two o'clock on that day. At six o'clock he was found

with his car definitely off the road. There was no garage or service station anywhere at hand. The nearest farm was three miles away. He was an hour and a half drive from his destination of Colville. He was of an excitable and nervous disposition. He had never been in the habit of doing hard, manual work. When found by the Harringtons he was worn out, exhausted, "all in" and sick. Mr. Harrington saw evidences of his having shoveled dirt. He saw a rock under the running board and saw that "he had evidently tried to build it up to get it back on this boulder." Appellant's own counsel brought out by cross-examination of Tom Heatfield who visited the scene three or four days later that there were indications of his having shoveled 500 to 600 pounds of dirt (Tr. p. 173). He drove two miles to the Forest Ranger Camp and Tom Callan saw him there sick and bent over and trying to vomit. Tom Callan put him to bed and he died during the night. Mrs. Heatfield said that the top shirt he was wearing showed that it had been soaked with perspiration. The references to the transcript of the record of all of the evidence next above set out are in the appellee's statement of the case.

Taking everything into consideration we believe there was enough evidence to justify any jury in arriving at a reasonable inference that Mr. Heatfield had over-exerted himself in trying to get his car back on the road and that the over-exertion was unusual and out of the ordinary.

At the trial Drs. Myhre and Snyder testified that

from their examination of the body and from the foregoing history of the case they believed that Mr. Heatfield died of myocardial insufficiency. It is true that Drs. Lewis and Reid said he died from natural causes. Dr. Lewis declaring of old age, and Dr. Reid of angina pectoris. There was a definite conflict in testimony between the four doctors and the jury found with Drs. Myhre and Snyder.

The next question is whether the court committed error in admitting certain testimony. Objection was made at the trial and later in appellant's brief that Tom Heatfield had not sufficiently identified the spot in the road about which he testified. According to Heatfield's testimony it appears that on July 3 he called at the ranger camp and was directed by one Abrahams where to go. He carefully followed directions until he saw marks of a car having been off the south side of the road. He took some pictures; then drove to Republic, and in doing so must have driven past Harrington's home. He stayed over night at Republic and drove back the next day and again he must have gone by Harrington's home. That day he took some more pictures. A reprint of one of these pictures which was later introduced in evidence was shown to witness Harrington and he testified that it "looked like the place."

Furthermore, Harrington testified that he told Heatfield where the car had been off the road "as near as I could (Tr. pp. 63-64). We are confident that there was no error on the part of the Court in admitting in

evidence a portion of Tom Heatfield's deposition.

Objection was made at the time of the trial to the introduction in evidence of the testimony of Floy Harrington and Tom Callan and appellant, in its brief, argues extensively that the portions of their testimony admitted over objection are not within the *res gestae* rule.

Appellant cites and strongly relies on the case of *Beck v. Dye*, 200 Wash. 1; 92 Pac. (2) 1113. We are in accord with the opinion which quotes six special elements of *res gestae*. It so happens that these six elements are set forth word for word in 32 Corpus Juris (2nd) Evidence, p. 21.

Let us take the six elements seriatim and see how the admitted testimony checks with each of them.

1. The statement or declaration made must relate to the main event and must explain, elucidate or in some way characterize that event.

When Mr. Heatfield told Mrs. Harrington and Mr. Callan that he had worked hard on the car and that he had over-exerted himself, such statements certainly related to the main event. That was in fact the main event in this case. The fact that he had over-exerted himself was the foundation on which plaintiff's case was built.

2. It must be a natural declaration or statement growing out of the event and not a mere narrative of a past completed affair.

Certainly the statements he made to these two witnesses came within that requirement.

3. It must be a statement of fact and not a mere expression of opinion.

We believe the Supreme Court of the State of Washington was entirely correct in deciding the *Field v. North Coast Transportation Company* case, 164 Wash. 123; 2 Pac. (2) 672, cited in appellant's brief as it did. In that case the witness was asked if someone did not criticize him about the way he was driving. That definitely attempted to express a conclusion or an opinion of the unknown party who spoke to the driver. It could not be construed in any other way except as merely the statement of an opinion.

In our case the nearest thing to an opinion is a remark of Heatfield that he had over-exerted himself.

If someone else had said that Heatfield had over-exerted himself that might have been an expression of an opinion or a conclusion of the witness, but when the words came from the lips of Mr. Heatfield, that constituted a statement of fact. Mr. Heatfield had lived with his body for 65 years. He knew, as a fact and not as an opinion whether he had overtaxed his strength and when he said "I over-exerted myself" he knew that to be a fact and he was stating a fact.

We find this very apt expression in the case of *In re Liquor Seized at Auto Inn, Wells v. People*, 197 N. Y. S. 758, at page 760:

"It is a general rule of evidence that a witness or affiant must state facts and not conclusions of facts or opinions. The line between a statement of fact accepted as evidential and a statement of conclusion of fact, insufficient as a matter of evidence, is in many cases shadowy and difficult to define. There are tests, however, which assist in distinguishing the one from the other. Where, in relation to a given statement, it is apparent that there is in the mind of the witness an immediate correspondence between the ideas expressed and the realities observed, the statement of such ideas is an evidential fact of the highest character as the idea is intuitive and represents the reality without conscious reasoning. As observation, however, decreases in value and reasoning increases the statement becomes of less weight evidentially until a point is reached where the statement is rejected entirely as evidential and is branded as a conclusion."

Applying that test to the instant case we maintain that when Mr. Heatfield said "I over-exerted myself" there was in his mind an immediate correspondence between the idea expressed and the reality which had been observed by him.

There is ample authority that the question of whether evidence shall be admitted under the rule of *res gestae* must be left to the sound discretion of the trial judge and that his judgment will not be reversed except in cases of manifest abuse of discretion.

In the case of *Wm. C. Barry, Inc., v. Baker,* 82 Fed. (2) 79, the first Circuit Court of Appeals says:

"As to whether such declarations should be admitted in a given case, the general and better rule seems to be that it is largely a question to be deter-

> mined by the trial court upon consideration of all the circumstances disclosed, including the proximity of the declaration to the occurrence of the accident. * * * It is there said (referring to Greenleaf) 'these surrounding circumstances constituting part of the res gestae * * * may always be shown to the jury * * * and their admissibility is determined by the judge according to their relation to that fact and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description."

In the case of *Rast v. Mutual Life Ins. Co. of New York*, 112 F. (2) 769, the Court says:

> "These cases, both State and Federal, wisely hold that in the admission of testimony of this kind much must be left to the exercise of a sound discretion by the presiding judge."

In the case of *Wilkins v. Knox*, 142 Wash. 571, 253 Pac. 797, the Supreme Court of Washington said:

> "Whether such testimony (opinion) shall be received or excluded is a matter of sound judicial discretion, the exercise of which will not be disturbed by an appellate court except for a very plain abuse thereof, as has been a number of times held by this court in common with the view prevailing generally elsewhere in the United States."

Even if we admit that there was some element of "conclusion" in the statement of Mr. Heatfield that "I over-exerted myself" there certainly was enough element of fact in that statement to call into play the rule that much must be left to the discretion of the trial judge.

The next two elements we think should be considered

together. Element No. 4 is "it must be a spontaneous or instinctive utterance of thought dominated or evoked by the transaction or occurrence itself and not the product of premeditation, reflection or design."

Element No. 5 is: "While the declaration or statement need not be coincidental or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation."

Appellant has cited many cases in its brief apparently with the thought that the declarations to Mrs. Harrington and to Tom Callan were too remote as to time to have been properly admitted. The Washington case of *MacGarry v. Rodgers,* 144 Wash. 375, 254 Pac. 314, is cited. In that case there was no accident: no personal injury, and no pain and suffering. It was an action to recover damages for alleged breach of contract to support. The evidence showed that plaintiff was ordered from the home of defendants and went two or three miles to a doctor's office and then the doctor was permitted to testify as to plaintiff's recital to him of what had happened at defendant's home. This clearly was not properly admitted under the *res gestae* doctrine.

The case of *Aetna Life Insurance Company v. Kern-Bauer,* 62 Fed. (2) 477, is another case cited by appellant. That was a case on an accident policy and the gist and foundation of the "accidental means" of that case was that assured's car had been run off the road. The evidence showed he left a friend's home at about

5:30 or 6 o'clock p.m. Five hours later he was found in his car off the road 50 miles distant from the friend's house. Two witnesses came along and were permitted to testify that deceased told them that the lights of some car blinded him. That was the only evidence of "accidental means" in the case. The Circuit Court of Appeals of the Tenth Circuit granted a new trial but in so doing the opinion states:

> "If both witnesses were testifying to the same statement, and if it was made as soon as they found him, the record is still silent as to how long a time elapsed, or what transpired between the time the lights blinded him and his narration of the event. It may have been 3 minutes or 3 hours. * * * Upon this record he may well have been sitting in his car for hours, * * * reflecting on many things, including an explanation of the accident. The proof leaves the circumstances in the realm of pure speculation."

In the Heatfield case the gist of the case is not what caused the Heatfield car to be off the road. The gist of the Heatfield case is the fact that Mr. Heatfield had over-exerted himself. The evidences of the over-exertion were apparent when Mrs. Harrington and Tom Callan talked with him. Mrs. Harrington was at the very scene where the exertion had occurred. Tom Callan talked with him two miles away about half an hour later and Heatfield was still sick and bent over and part of the time was lying on the ground. The lapse of time for reflection that occurred in the *Aetna Life* case did not occur in the case now under consideration. Furthermore the *Aetna* case was purely and simply a narration of a past event. We are confident

that under all of the facts the *Aetna Life* case is not applicable.

The case of *Chesapeake & Ohio Ry. Co. v. Mears,* 64 F. (2) 291, is cited in appellant's brief. That case goes into the question very thoroughly. The trial court permitted certain statements to go in evidence and the Circuit Court of the Fourth Circuit said the trial court was correct. The opinion quotes from Wigmore on Evidence and from opinions from other jurisdictions and we take the liberty of quoting from the *Mears* opinion. On page 292 the Court says:

> "As pointed out by Professor Wigmore, it is not necessary to render such declarations admissible that they be strictly contemporaneous with the occurrence to which they relate. * * * They are admissible, not because they fall without the hearsay rule, as in the case of 'Verbal Acts' but because they fall within an exception to that rule it being considered that there is a sufficient guarantee of the trustworthiness of such declarations to render them admissible, if they are made under the immediate influence of the occurrence to which they relate. The circumstantial guarantee here consists in the consideration * * * that in the stress of nervous excitement the reflective faculties may be stilled and the utterances may become the unreflecting and sincere expression of one's actual impressions and belief."

And again, on page 292, the following quotation:

> "Here the principal fact is the bodily injury. The res gestae are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affliction is the subject

> of the inquiry the sickness or affliction is the principal fact. The res gestae are the declarations tending to show the reality of its existence and its extent and character. The tendency of recent adjudications is to extend rather than to narrow the scope of the doctrine."

And again, on page 293, the following quotation:

> "Statements thus made, which are not a narrative of a past transaction but spring naturally and without premeditation from the lips of an injured person in the very pressure of the circumstances which have produced it and while the victim is perhaps writhing in pain are of the highest value in evidence."

And again, on page 293, the following quotation:

> "It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the res gestae and much difficulty has been experienced in an effort to formulate general rules relative to the subject. This much may, however, be safely said, that declarations which are the natural emanations or outgrowths of the act or occurrence in litigation although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate or explain and were made under such circumstances as necessarily to exclude the idea of design or deliberation must upon the clearest principles of justice be admissible as part of the act or transaction itself."

Applying these principles to the case at hand let us again briefly review the evidence: Mrs. Harrington found Mr. Heatfield with his car off the road. Her husband had seen that Heatfield had done some work

in an effort to get it back. Heatfield was worn out, exhausted and "all in" and appeared to be suffering. About two miles from that place and within half an hour afterwards Tom Callan saw him when he was doubled over and sick. It cannot be said that the exclamations he made to them were not spontaneous or that they were made after design or deliberation as to the effect the statements would make on his listeners. Heatfield did not know he was going to die or might die. Otherwise he would have taken advantage of Callan's offer to get help. All he knew was that he was sick. He knew why he was sick; he knew that he had over-exerted himself, and as a result of his physical ailment and the nervous excitement under which he was laboring, he told them what caused his sickness and that it was the first time in his life that he had ever been sick that way. The declarations were clearly admissible under Rules IV and V of the doctrine of *res gestae.*

The sixth rule under *res gestae* is that it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration was made.

The Washington case of *Beck v. Dye,* 200 Wash. 1, cited and relied upon by the defendant in its brief was decided on this part of the rule and this part of the rule alone. But palpably there can be no contention that Mr. Heatfield was not a participant in the transaction.

We maintain that the exclamations of pain, suffering, sickness and fatigue and what caused it made to Mrs. Harrington and Mr. Callan were a part of the *res gestae* and that the trial court did not abuse his discretion in admitting them.

About one-half of appellant's brief (8 out of the 19 cases cited) is devoted to defendant's contention that the plaintiff did not give the notice provided in the policy and that the trial court was in error in holding that the letter of July 8 set forth in full on page 25 of appellant's brief was sufficient notice.

The policy provides "written notice of injury on which claim *may* (italics ours) be based must be given to the company within twenty days * * *. Such notice * * * with particulars sufficient to identify the insured, shall be deemed to be notice to the Company."

33 C. J. Vol. 33, page 16 (Insurance) says:

> "The object of the notice is to acquaint the company with the occurrence of the loss so that it may make proper identification and take such action as may be necessary to protect its interest."

In the first place it should be remembered that this is an accident policy: not a life policy nor a double indemnity contract. Simply an accident policy providing for payment if death was met by accident. Within 8 days after the accident the beneficiary advised the insurer in writing that assured had died and that "there will probably be a claim made for payment under your accident policy." (The caption of the letter gave the name of the assured and the number of the

policy.) (Tr. pp. 8-9, 77-78). What was the purpose of that letter other than to acquaint the company with the loss under the accident policy and give the company a chance to make proper investigation? Furthermore, what was the company's reaction to this letter? Did it simply consider this as a statement that assured had died and that therefore no further premiums would be paid under the policy? No. As alleged in the complaint and as admitted in the answer, the insurance company had its doctor present at the autopsy which was made on July 10. The letter of July 8 had advised the insurance company when autopsy would be made. Regardless of any other cases which may have been decided on other facts, we simply ask the question: "What did the Standard Accident Insurance Company think when it received the letter of July 8?" The only answer to that question is that the Insurance Company knew that claim "*might*" be made under the accident policy, and the insurance company took advantage of one of the very purposes of the notice, *i.e.*, it was present at the autopsy so that it could determine for itself whether the death of Mr. Heatfield was by "accidental means." This conviction is emphasized by the fact, which appears in the record, that Dr. Peter Reid, the company's doctor who, we allege, and who was admitted to have been present at the autopsy, went before the jury and said that from his examination of the body the deceased died from natural causes and not from "accidental means" (Tr. p. 182-197).

The Supreme Court of the State of Washington held in the case of *McKillips v. Railway Mail Assn.*, 10

Wash. (2) 122; 116 Pac. (2) 330, that

> "The matter of chief importance is the requirement that notice of the fact that claim might be presented by a certificate holder should be promptly called to the attention of appellant's officers."

It must be remembered that the letter of July 8 was not contemplated to be and was not required to be a "Proof" of death by accidental means as further provided in the policy.

All that is required in the notice is that "written notice of injury on which claim *may* be based must be given the company * * * with particulars sufficient to identify the assured." The appellant contends, on page 33 of its brief, that the notice did not sufficiently identify the assured. We have no authorities in answer to this contention. Suffice it to say that we know of no way to identify the assured except to give his name and the number of the policy on which the company had been accepting premiums for many years.

The Washington case of *Hanly v. Occidental Life Ins. Co.*, cited in appellant's brief, is not applicable in favor of appellant. Rather it is in point for the appellee. The case was decided on an entirely different question than the form of the notice. As a matter of fact the Supreme Court of Washington held that the Notice in that case was good. The opinion quotes from the case of *Western Commercial Travelers Assn. v. Smith,* 85 Fed. 401, and the quotation includes the following:

> "Forfeitures are not favored in the law, and a strained and unnatural construction must not be given to this contract in order to impose one here."

The case of *City Bank Farmers Trust Company v. Equitable Life Assurance Co.*, cited in appellant's brief involved the question of "proof" and not "notice." Likewise the case of *Commercial Casualty Co. v. Stimson.*

The case of *Thompson v. U. S. Casualty Co.*, was one in which the policy required written notice. No written notice was given. All the plaintiff did was to say that "Mr. Thompson died of indigestion." There was not even a verbal notice that claim might or would probably be made. Nor was an offer made and accepted by the insurance company to be present at any autopsy.

The case of *Wachtel v. Equitable Life Assurance Assn.*, involves "proof" and not "notice."

The case of *Wilcox v. Massachusetts Protective Assn.*, goes not to the form of the notice but to the question that no notice was given at all until three days after the burial.

The case of *Barnett v. John Hancox Mutual Life Ins. Co.*, goes to the question of "proof" and not "notice."

There is a decided difference between what is required in a "notice" and what is required in a "proof." The policy in question provided for both instruments, and nowhere in the policy is there any requirement that the "notice" shall contain anything except a notice that claim may be made and an identification of the assured.

We respectfully maintain that when we wrote our letter of July 8 advising that claim would probably be made and when we gave the insurance company an opportunity to be present at the autopsy and when the insurance company took advantage of our "notice" by having its doctor present at the autopsy to determine whether Mr. Heatfield had or had not died from "accidental means," we gave the insurance company notice and the insurance company accepted notice that claim for accidental death might be made.

CONCLUSION

We respectfully submit: That the complaint stated a cause of action: That "notice" had been given to the Insurance Company: That there was ample evidence to go to the jury even without the objected testimony: That the Court committed no error in admitting the testimony of Mrs. Harrington, Tom Callan and Tom Heatfield: That the Court properly instructed the jury: And that the verdict of the jury and the judgment of the Court should be affirmed.

Respectfully submitted,

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